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No. 73-1457

In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

CECIL J. BISHOP, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Rule 23(1) (a) Opinions Below and Former Proceedings	1
Jurisdiction	3
Question Presented	3
Constitution and Statutes Involved	3
Statement	4
Reasons for Granting the Writ	5
Conclusion	7

APPENDIX

APPENDIX A	10

TABLE OF CONTENTS

Issues Presented 10

Statement of Case and Summary 12
The Facts 13
Louise's Salary and Expenses in Addition 15
Payments to Robert 16

Double Deductions 18

Discussion 20

Conclusion 23

CITATIONS

U. S. Constitution, Fifth Amendment 10

Statute, Internal Revenue Code of 1954
Section 7206(1) (26 U.S.C.) 11

Cases Cited:
F & A Ice Cream Co. v. Arden Farms Co.
D.C. Cal 98 F. Supp. 180 20

U.S. v. Spector, Cal 72 S.Ct. 591, 343
U.S. 169, 96 L. Ed 863, rehearing
denied 72 S. Ct. 1040 343 U.S.
961, 96 L. Ed. 1353 20

Reference Works
47 Corpus Juris Secundum 21

TABLE OF AUTHORITIES CITED

Cases

F. & A. Ice Cream Co. v. Arden Farms Co., D.C. Cal. 98 Fed. Supp. 180 6

Lanzetta v. State of New Jersey, N.J., 59 S. Ct. 618, 306 U.S. 451 6

U.S. v. Spector, Cal. 72 S. Ct. 591, 343, U.S. 169, Rehearing Denied 72 S. Ct. 1040, 343 U.S. 951 6

Winters v. People of the State of New York, N.Y., 68 S. Ct. 665, 333 U.S. 507 6

U.S. v. Townsend, D.C., 151 Fed. Supp. 378 7

Constitution

Constitution of the United States, Fifth Amendment 3, 7

Codes & Statutes

22 Corpus Juris Secundum 623 [Criminal Law Section 24 (2 a] 6

Internal Revenue Code of 1954 (26 U.S.C.) Section 7206, Fraud and False Statements 3

26 U.S.C. 7206 (1) 1

26 U.S.C. 7207 2

28 U.S.C. 1254 (1) 3

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

CECIL J. BISHOP, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, CECIL J. BISHOP, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeal for the Ninth Circuit; and the proceedings of the trial and conviction of Petitioner in the United States District Court for the Eastern District of California.

OPINIONS BELOW AND FORMER PROCEEDINGS

On February 16, 1971 Petitioner was convicted for making and subscribing, under the penalties of perjury income tax returns which he did not believe to be true and correct as to material matters in violation of 26 U.S.C. 7206 (1).

The United States Court of Appeals for the Ninth Circuit had reversed the conviction of the petitioner on the ground that the trial court erred in refusing to instruct the jury that they could find the taxpayer guilty of a lesser included offense of filing tax returns which he knew to be materially false or fraudulent in violation of 26 U.S.C. 7207.

A Writ of Certiorari was granted by the Supreme Court of the United States and by decision in that case No. 71-1698 (412 U.S. 346, 36 L. Ed 941) the Supreme Court of the United States reversed the decision of the United States Court of Appeals for the Ninth Circuit on the point appealed on, and the case was referred back to the Court of Appeals for the Ninth Circuit for decision on the two remaining issues.

The decision of the United States Court of Appeals for the Ninth Circuit was entered September 18, 1973 sustaining the conviction of petitioner (455 Fed. 2d 612) and thereafter that Honorable Court denied Petition for rehearing (485 Fed. 2d 248).

Petitioner then filed a Petition in Support of Motion for Reconsideration of Denial of Petition for Rehearing on March 8, 1974 in the United States Court of Appeals for the Ninth Circuit, which Petition has not been acted upon. A copy of that Petition is attached hereto as Appendix A.

This Honorable Court (No. A-824) granted an Order Extending Time to File Petition for Certiorari on March 31, 1974.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. DID THE GOVERNMENT VIOLATE THE "DUE PROCESS' CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IN ITS APPLICATION OF THE FACTS TO THE LAW, A STANDARD OF GUILT WAS NOT FIXED WITH REASONABLE CERTAINTY?

2. THERE WAS NOT AN ASCERTAINABLE STANDARD OF GUILT FROM THE EVIDENCE PRESENTED BY THE GOVERNMENT AGAINST PETITIONER AT TRIAL, AS VIOLATIVE OF THE "DUE PROCESS" CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

CONSTITUTIONAL PROVISIONS INVOLVED:

FIFTH AMENDMENT: "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

STATUTORY PROVISIONS INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.)

Section 7206. *Fraud and False Statements:*

Any person who –

(1) *Declaration under penalties of perjury.* – wilfully makes and subscribes any return, state-

ment, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

* * * *

shall be guilty of a felony * * *.

STATEMENT

In each of the three subject years of conviction, petitioner (taxpayer) gave his manager certain sums of money for the running of his ranch, and which sums of money petitioner listed as deductions on his income tax return.

The manager of the ranch received all of the sums, and from the date of receipt the manager was in sole and exclusive possession and control of those sums, which she spent without direction of petitioner, for ranch purposes. Petitioner did not participate in ranch management.

The manager spent part of the money received by her from petitioner by check, and in each year the manager gave petitioner a listing of those checks. THIS LIST WAS THE BASIS OF THE GOVERNMENT'S CLAIM OF AN OVERSTATEMENT BY PETITIONER OF DEDUCTIBLE EXPENSES.

The manager spent the balance of the money, for ranch purposes as she testified, but the notes she kept of these other expenditures were in chaos, and she was unable to interpret what the other expenditures were for, nor was there any way to ascertain what that money was used for.

The list of the checks were untitled; their total bore no relationship to the amount of money given the manager by petitioner, and of course were a much less amount.

The manager had no tax or legal education, nor was she a bookkeeper, nor was she hired as a bookkeeper. THERE WAS NO STANDARD FOR MAKING THAT LIST EXCEPT THAT IT WAS THE MONEY SHE SPENT FOR THE RANCH BY CHECK. The manager testified that this list was of all "tax deductible items".

The difference between that list of checks prepared by the manager and the amounts deducted by the taxpayer was the basis of the overstatement of deductible expenses, which was the basis of the charge and the conviction.

REASONS FOR GRANTING THE WRIT

This case presents a substantial due process question. The issue is important, as there appears no limit on the Government in Income Tax Cases for alleging fraud, if this case is allowed to stand, for the result is shockingly wrong.

This honorable court previously, at the instance of the Solicitor General of the United States, granted certiorari, and determined that the statute under which the charge was made was only a felony.

Basically what the case holds is that where money is given by a taxpayer to a manager for the operation of a business, in the sole control of the manager, *it is fraud on the part of the taxpayer to deduct as business*

expenses AMOUNTS FOR WHICH THE MANAGER CANNOT ACCOUNT.

A penal statute should explicitly establish the elements of the crime which it creates and provide some reasonably ascertainable standards of guilt. *Winters* v. *People of the State of New York*, N.Y., 68 S. Ct. 665, 333 U.S. 507. A person may not be required at peril of life, liberty or property to speculate concerning the meaning of a penal statute, but all are entitled to be informed concerning what the state commands or forbids. *Lanzetta* v. *State of New Jersey*, N.J., 59 S. Ct. 618, 306 U.S. 451. The standards of certainty in statutes prescribing punishment for offenses are higher than in those depending primarily on civil sanction for their enforcement. 22 Corpus Juris Secundum 623 [Criminal Law Section 24 (2) a].

As Mr. Justice Douglas commented, a statute may be given an application that violates due process of law. *U.S.* v. *Spector*, Cal. 72 S. Ct. 591, 343 U.S. 169, rehearing denied 72 S. Ct. 1040, 343 U.S. 951.

We submit that the application of this penal statute with reference to fraud in income tax returns here has been given an application that violates due process. The test of reasonableness or unreasonableness is judged by deference to a common standard of conduct, to satisfy due process requirement of definiteness. *F. & A. Ice Cream Co.* v. *Arden Farms Co.*, D.C. Cal. 98 Fed. Supp. 180.

The courts have said that in guarding a citizens constitutional rights in criminal cases, courts are not concerned with a particular defendant's innocence or guilt

of the crime charged, as no man may be convicted except by due process of law. These constitutional rights are all that stand between the citizen and a police state. *U.S.* v. *Townsend*, D.C., 151 Fed. Supp. 378.

I submit that the list of the ranch manager, which had no ascertainable basis with reference to tax law, was no standard of guilt whatever, and failed to meet the requirements of due process under the Fifth Amendment to the Constitution of the United States.

CONCLUSION

For these reasons, a writ of certiorari should issue to reverse the opinions of the Court of Appeal of the Ninth Circuit.

Respectfully submitted.

CECIL J. BISHOP
A member of the Bar of this Court
In Propria Persona

APPENDIX A

No. 71-1950

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CECIL J. BISHOP, DEFDNDANT-APPELLANT

On Appeal from the Judgment of the United States District Court for the Eastern District of California

PETITION OF APPELLANT FOR REHEARING

CECIL J. BISHOP
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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71-1950

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CECIL J BISHOP, DEFENDANT-APPELLANT

On Appeal from the Judgment of the United States District Court for the Eastern District of California

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Petition In Support Of Motion For Reconsideration Of Denial Of Petition For Rehearing

The appellant pursuant to Rule 40 of the Federal Rules of Appellate Procedure, respectfully petitions for a rehearing of the decision of this Court entered on September 18, 1973, affirming a judgment of conviction on three counts of violating Section 7206(1) of the Internal Revenue Code of 1954. The case was heard by Circut Judges Ely and Wright, and District Judge Powell. The opinion was *per curiam*.

ISSUES PRESENTED

1. DID THE GOVERNMENT VIOLATE THE "DUE PROCESS" CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IN ITS APPLICATION OF THE FACTS TO THE LAW IN THE PRESENT CASE, A STANDARD OF GUILT WAS NOT FIXED WITH REASONABLE CERTAINTY?

2. THERE WAS NOT AN ASCERTAINABLE STANDARD OF GUILT FROM THE EVIDENCE PRESENTED BY THE GOVERNMENT AGAINST THE DEFENDANT, TO SUSTAIN A CONVICTION, AS VIOLATIVE OF THE "DUE PROCESS CLAUSE" OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

3. WAS THE ADMISSION OF THE DEFENDANT'S 1961 INCOME TAX RETURN INTO EVIDENCE, IN VIOLATION OF THE "DUE PROCESS" CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

4. WAS THERE COMPETENT EVIDENCE TO SUPPORT THE INTRODUCTION OF THE DEFENDANT'S 1961 INCOME TAX RETURN INTO EVIDENCE, AND WAS ITS ADMISSION UNDULY PREJUDICIAL TO THE DEFENDANT?

UNITED STATES CONSTITUTION

FIFTH AMENDMENT:

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.)

Sec. 7206 *Fraud and False Statements:*

Any person who—

(1) *Declaration under penalties of perjury.*— Wilfully makes and subscribes any return,

> statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;
>
> * * * *
>
> shall be guilty of a felony * * * .

STATEMENT OF THE CASE AND SUMMARY

Cecil J. Bishop, the taxpayer, was tried before a jury on a three count indictment charging violation of Section 7206(1) of the Internal Revenue Code, subscribing a false return, in respect to his income tax returns for 1963, 1964 and 1965. He was convicted on all counts and appealed to this court. (R. 69.)[1]

Taxpayer's appeal alleged the following errors:

(1) Failure to give a requested jury instruction regarding a lesser included offense; (2) the admission in evidence of his tax return for a year not covered by the indictment; and (3) the admission of evidence concerning an item of income which he reported in his 1964 return and which should have been reported in 1965. This Court reversed the conviction on the basis of the trial court's failure to give the lesser concluded offense instruction, but did not reach the remaining issues. ($455 F2d 612). Thereafter certiorari was granted (93 S. Ct. 64) and the decision of this Court was reversed and remanded with instructions to consider the remaining issues. (93 S. Ct. 2008)

The Court denied the prior petition for rehearing on January 30, 1974. Defendant petitioned for extension of

[1] "R" is reproduced record on appeal

time to file for writ of Certiorari before the Supreme Court of the United States, and a copy thereof is attached hereto.

THE FACTS

The taxpayer is an attorney in Sacramento [no farmer (Rt. 315:23-24)],[2] who had a walnut ranch in Red Bluff, which was wholly managed by his stepmother, Louise, from 1960 until 1967. (Rt. 71, 772, 896, 897). She married taxpayer's father January, 1960, and lived with him at the ranch until his death June 3, 1960. (Rt. 177).

To finance the operation of the ranch, taxpayer paid checks to Louise, and paid other bills directly.

To each return, taxpayer attached a list of all his checks. The Government conceded that those schedules correctly reflected payments actually made, but challenge the deductibility of certain items, (Rt. 867-868) resulting in overstating the expenses of the ranch.

All checks from taxpayer to Louise, were put by her in a joint account with her son, Robert (taxpayer's stepbrother) from 1960 to June 1965, and thereafter in a joint account with taxpayer. (Rt. 76; 77; 284:25; 382:1-13; 391:18-22; 394:17-20; 383:10-14).

All checks were a lump sum, without any segregation or designation as to specific use of the money—(Rt. 76-77; 89: 196:12) Louise made all withdrawals.

Each year taxpayer asked Louise to furnish him a list of expenditures, and each year Louise did prepare and give taxpayer a list of expenditures, prepared from only

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2. "Rt" is Reporter's Transcript. The first number is the page; when followed by a colon, the reference is then to a line.

checks and stubs (Rt. 91:18-20; 96:99-100; 162:11-16; 168:23; 173:4; 242), which she says were all tax deductible items (Rt. 89-105), which she never discussed with taxpayer (Rt. 94; 135:17-20; 103:1-5; 239). This list did *not* account for all of the money given by taxpayer to Louise, and *the difference between the total of these lists of Louise and the amounts claimed by taxpayer was the basis of the charge of overstating his expense.*

Louise had no tax training and was not a bookkeeper. (Tr. 324:18-19).

Aside from the checks listed by Louise in that list (Rt. 100:23-24) she kept a daily diary and an "Ideal System", both of which are chaotic and which Louise was not able to understand or interpret. (Rt. 178-404)

But:

(1) Louise was instructed to prepare a list of *expenses* of the ranch, not tax deductible items. (Rt. 93:4-5)

(2) The list did not include Louise's salary, even though it was paid from the money given to Louise by taxpayer Rt. 87:23; 89:9-11; 197). In 1965, one of the indictment years, no deduction was taken by taxpayer for any salary to Louise.

(3) The list bore no relationship to the amount of money given Louise and there was no possible reconciliation (even using the daily diary and "Ideal System") between that list and the amount given Louise. There were *no* other records. (Rt. 199:1-18)

(4) Louise did not include in that list money she was advancing from her own money (Rt. 244:16-24; 432). She advanced considerable sums (Rt. 211:13)

(5) The list did not include payments to Robert, which Louise said were for his education. (Rt. 102:16-17).

(6) The swimming pool is not an issue (Rt. 880:24) and therefore expenditures therefor are not in issue.

(7) The expenditures not listed could not be for entertainment of taxpayer's weekend guests, because after the taxpayer's father's death in June, 1960, the taxpayer came to the ranch on weekends "pretty much alone". (Rt. 74:10-19)

(8) Household expenses were not included. These are discussed subsequently.

(9) There were other deductible items not included, such as payment of bill to Flaharty Tractor (Rt. 285:17; 276-288; 302).

(10) Louise testified that all the money sent her by taxpayer was used by her for ranch expenses. (193:20-21; 311:9-10; 312:14-15; 329:7-8; 334:24-25; 341:10-11; 356:4-5; 360:3-4; 386:18-19)

Louise's Salary and Expenses in Addition:

Louise testified she was to get $50.00 per week salary (Rt. 205:25) and she was to get $50.00 a week "household expenses" (Rt. 204; 87:20 to 89:11) for things such as a breakdown of ranch machinery and "a lot of things running a ranch that you will incur," (Rt. 74:1-9). To purchase a pruner (Rt. 193:18), tools (Rt.

193:18), to pay ranch bills, for cleaner and anything you have need for around a ranch. (Rt. 195:13) No records (which can be interpreted) were kept of such expenditures, as Louise testified: "It *isn't a deductible item*". (Rt. 199:21), and did not include it in the list of deductible items. (Rt. 640).

Internal Revenue Service was unaware of anything further to Louise than merely $50.00 a week, (Rt. 713-714; 578:9-16) and would not allow any deduction. (Rt. 718:20-23).

Payments to Robert:

Robert testified he was *paid for part of the work* he did at the ranch, *but not all of it.* (Rt. 438:1-14)

Robert, Louise's son, did everything at the ranch from maintenance of equipment to field chores—anything that came up from minor repairs on tractor equipment to assembling new equipment, to doing very small amount of design. (Rt. 437:7-14) He repaired tractors, and pruning cage; designed equipment. He did a lot of "good, solid work". He took a course and did welding. (Rt. 376; 377; 380:23-25; 381).

At first Robert got no direct pay (Rt. 375-376), then he got $1.00 per hour paid to him "as an incentive", but the usual wage for the work he did was much more. (Rt. 381:1-18)

Taxpayer testified that on the day of his father's death, he said that he would see that Robert completed his schooling. The Government's contention that all payments other than the $1.00 per hour to or for Robert

for seven (7) years were a personal obligation of taxpayer, unrelated to employment, (Rt. 455:14-20; 488:13-16; 866:2-3) and based on that conversation on the day of his father's death, were for Robert's education.

Robert testified that conversation was "essentially that neither I nor my mother would have to worry about my education expenses, that he (the taxpayer) would take care of it". (Rt. 436:18-20) Louise testified that taxpayer said he would "put him through school; what he needed for schooling, the taxpayer would pay for it." (Rt. 191:15-21).

Taxpayer testified that the payments to Robert were in payment of wages. The amount of payment to Robert was never discussed with taxpayer. (Rt. 502:3-23; 136:13; 191-192; 440).

There is no showing of any close relationship between taxpayer and Robert, and Louise took Robert as a dependent (192:13) on her returns. There is no showing of an agreement that Robert was not to receive the usual wage for his employment.

There is no evidence that any payment to Robert was to be considered for his schooling during that seven (7) years. No record was kept of Robert's wages, work duties or hours. (Rt. 165:20; 377:9-25; 378:6-13; 379:1-25) and no record was kept of what was spent on Robert's schooling (Rt. 448:22; 440; 450-451; 455:14-20; 44:5-6).

It is assumed that all payments to Robert were for his schooling.

Double Deductions:

The Government contents there were duplicate deductions on the 1963 (one of the indictment years) and 1961 (admitted over objections) returns of the taxpayer.

In those years there was attached to his return a list of taxpayer's checks to Louise, and a list from Louise of her expenditures.

In these years, there is no doubt that in addition to what taxpayer paid Louise by check, and that Louise loaned considerable sums of money to the taxpayer (Rt. 211:13; 344:2-5); as she paid expenses from her own funds, purchased equipment from her own funds and borrowed from the bank, and withheld household expenses to pay bills. (Rt. 211:22; 173:18; 266:1; 173:8-12; 262:20-22; 264:21). It is obvious that none of these amounts would be listed in the list of checks from taxpayer to Louise.

Louise gave a statement to Internal Revenue: "I have made two loans to Cecil Bishop. The first loan was in 1963. I do *not recall the original amount of this loan. The last payment* made on this note was a *check for $5,500.00* from Cecil Bishop dated July 24, 1964. Subsequently a new note was issued for additional monies advanced to Cecil Bishop. The face amount of this note was $6,123.00 plus 7% interest. Although this note was actually made after the previous note was *partially* paid off, it was dated in September, 1963, and Cecil Bishop wrote the note . . ." (emphasis added) (Rt. 252:15-25)

But she testified at the trial the prior note was for

$5,000.00 (Rt. 215:5) and she and her son had difficulty explaining why it was a "last payment".

But at the trial she testified that the prior note was for $5,000.00 at 7% (Rt. 215.5) repayment 7 months later was $5,500.00. But how could that be a "last payment" on a lesser amount, if she had not told taxpayer that he owed her more.

Louise's records of what taxpayer owed her were chaotic, and no notes were ever produced. Robert said there was going to be a consolidation of the amount owed, but that again is extremely unclear, as to amounts, what was paid, what was advanced to taxpayer, and what was due. (Rt. 458-463; 464-482)

Taxpayer testified that in repayment of the amount which Louise had told him he owed her, and which were the total of the extra attached lists to the 1961, 1962 and 1963 returns, about $35,000.00; and he agreed when Louise had accounted for the money he advanced and he loaned her, he would give her land, and build a house costing $35,840.75, plus $500.00 for septic tank. (Rt. 410:7-10)

She had selected a site for the home, had it surveyed for her, laid it out on the ground; had the plans for the home drawn for her and staked out on the ground. (Rt. 408:19, Exhibits I to L).

While Louise said the house was unrelated to indebtedness, she said the taxpayer was going to pay for the home. It was a sale to her and it was not a gift; that she would have paid every penny for it. (Rt. 405, 406, 408; 411-412)

Therefore, the two lists could not have been complete duplicates; in addition to the money to Louise from taxpayer, Louise did advance her own funds, in an uncertain amount, but which were not listed, unless they were the list of expenses she sent down, and which were attached to taxpayer's 1961, 1962 and 1963 returns.

DISCUSSION

I. DID THE GOVERNMENT VIOLATE THE "DUE PROCESS" CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT ITS APPLICATION OF THE FACTS TO THE LAW IN THE PRESENT CASE, A STANDARD OF GUILT WAS NOT FIXED WITH REASONABLE CERTAINTY?

Due process applies to legislation in criminal matters, and in order to constitute due process of law, a penal statute must fix a standard of guilt with reasonable certainty. *Williams* v. *U. S.*, C.A. Fla, 179 Fed. 2d. 644, affirmed 71 S.Ct. 581, 341 U.S. 70, 95 L. Ed. 758.

A statute may be given an application that violates due process of law. *U.S.* v. *Spector*, Cal. 72 S.Ct. 591, 343 U.S. 169, 96 L. Ed 863, rehearing denied 72 S.Ct. 1040, 343 U.S. 951, 96 L. Ed 1353.

The test of reasonableness or unreasonableness or similar tests which can be judged by reference to a common standard of conduct, satisfy due process requirement of definiteness. *F. & A. Ice Cream Co.*, v. *Arden Farms Co.*, D.C. Cal. 98 F. Supp. 180.

Basically, the standard fixed by the application of

the facts to the law was that the list prepared by Louise was all of the tax deductible items. (Rt. 643:16 to 644.2) Louise was neither an expert or a C.P.A., and she had no standards by which to judge what was tax deductible. (Rt. 412:25-413:1)

Louise treated all money from taxpayer as hers, and she was to use it only for the ranch. Should this not be income to Louise? It was not included in her returns. 47 *Corpus Juris Secundum* 225, defines taxable income as "all income which taxpayer has received under claim of right and without restriction as to its disposition.

While it might be arguable as to civil liability as to what was tax deductible, the payments were actually made to Louise, and Louise's list is not a constitutional basis as a standard of guilt.

Again, with reference to Robert's education. *All amounts* paid to Robert for a seven (7) year period were assumed to be for his education. Again, no standard is set as to what school expenses were and there is no showing the school expenses would exceed the amount of usual wage for the work Robert did on the ranch.

Here there is no standard of guilt whatever.

II. THERE WAS NOT AN ASCERTAINABLE STANDARD OF GUILT FROM THE EVIDENCE PRESENTED BY THE GOVERNMENT AGAINST THE DEFENDANT TO SUSTAIN A CONVICTION, AS VIOLATIVE OF THE "DUE PROCESS CLAUSE" OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

I have detailed the factual situation in some depth to show that at no time was there any standard raised for guilt.

Basically, taxpayer was convicted, not for misstatement of what he paid, but because Louise could not account for the money which she received and which she loaned to run the ranch.

III. WAS THE ADMISSION OF THE DEFENDANT'S 1961 INCOME TAX RETURN INTO EVIDENCE IN VIOLATION OF THE "DUE PROCESS" CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

The admission of the 1961 return, was admitted not so much to show a pattern of overstating deductions by the taxpayer, as to show that the standard of guilt the Government applied in this instance was only based on Louise's listing of what was tax deductible, and that she need not account for what was given to her or loaned by her to run the ranch.

The Government's position was not a question of duplication, it was simply a question of including in the schedule items that should not have been deducted as farm expense. (Rt. 880:9)

This continued use of the standard of guilt: That is, any deduction other than given on Louise's "list of tax deductible items" was in violation of "due process" under the Fifth Amendment. There was no logical, legal, or bookkeeping basis for the list of Louise.

IV. WAS THERE COMPETENT EVIDENCE TO SUPPORT THE INTRODUCTION OF THE DEFENDANT'S 1961 INCOME TAX RETURN INTO EVIDENCE, AND WAS ITS ADMISSION UNDULY PREJUDICIAL TO THE DEFENDANT?

The only basis for the introduction of this return was the voir dire examination of the witness, which has been previously briefed, as not being a basis for its introduction. The Court had based its previous opinion thereon.

This return was unduly prejudicial to the taxpayer, as it again perpetuated the Government's standard of guilt: Louise's list of what she said were the "tax deductible items".

CONCLUSION

I believe this question is of great importance, not only to me as a defendant, but that it clearly violates "due process" under the Fifth Amendment to the Constitution of the United States to use such a vague and contradictory standard of guilt as the Government used in this case.

I respectfully urge that this Court grant a rehearing and that the Court restore the case to the calendar for reargument, and that pending a decision hereon, that the Mandate be recalled.

Dated: February 28, 1974.

Respectfully submitted,

CECIL J. BISHOP
In Propria Persona

CERTIFICATES OF COUNSEL

I, Cecil J. Bishop, in Propia Persona, appellant, hereby certify as follows:

1. CUSTODIAL SERVICE

Execution of sentence in this case has been stayed pending disposition of this appeal and Defendant-Appellant is presently free on his own recognizance.

2. GOOD FAITH

This Petition for rehearing is presented in good faith and not for delay.

3. SERVICE

Service of this petition for rehearing has been made on opposing counsel by mailing four copies thereof on this 28th day of February, 1974, in an envelope, with postage prepaid, properly addressed as follows:

Meyer Rothwacks, Esquire
Chief, Appellate Section
Tax Division
U. S. Department of Justice
Washington, D. C. 20530

Dwayne Keyes, Esquire
United States Attorney
Room 2058 - Federal Building
650 Capitol Mall
Sacramento, California 95814

CECIL J. BISHOP

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

vs.

CECIL J. BISHOP

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI

Defendant in Propria Persona, requests an extension of time within which to petition for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit sustaining the conviction of the defendant for making and subscribing, under the penalties of perjury, income tax returns which he did not believe to be true and correct as to material matters, in violation of 26 U.S.C. 7206(1).

Earlier, the Court of Appeals for the Ninth Circuit had reversed the conviction of the defendant on the ground that the trial court erred in refusing to instruct the jury that they could find the taxpayer guilty of a lesser included offense of filing tax returns which he knew to be materially false or fraudulent, in violation of 26 U.S.C. 7207. A writ of Certiorari was granted by the Supreme Court of the United States, and by decision in that case No. 71-1698 on May 29, 1973 (93 S. Ct. 2008), the Supreme Court of the United States reversed the decision of the Court of Appeals for the

Ninth Circuit on the point appealed on, and the case was referred back to the Court of Appeals for the Ninth Circuit for decision on the two remaining issues.

The decision of the Court of Appeals for the Ninth Circuit was entered September 18, 1973, and a petition for rehearing was denied on January 30, 1974.

The time to file a petition for a writ of certiorari, if not extended, would expire on March 1, 1974.

This Court's jurisdiction would be invoked under 28 U.S.C. 1254(1)

A copy of the Opinion below is annexed hereto.

Petitioner is also filing a new Petition for Reconsideration for Rehearing in the Court of Appeals for the Ninth Circuit, raising the basic point that the application in the instant case violated due process under the Fourteenth Amendment of the Constitution of the United States in that it does not fix a standard of guilt with reasonable certainty in that the standard used to base the charge of an overstatement of farm expenditures was a list prepared by a person, the ranch manager, who was neither trained in law or in tax law nor was she using any standard in making such list, except that it was all the expenditures she made by check, and her records could not specify other expenditures except generally they were for the ranch.

By using such a standard in enforcement of 26 U.S.C. 7206(1), there could be no possibility of a verdict of "not guilty", as there is no set standard by which to judge a deduction.

As petitioner now appears in Propria Persona, addi-

tional time is needed for further research in the case, and to prepare a Petition for Writ of Certiorari and to print it.

It is therefore respectfully requested that the time within which the defendant may petition for writ of certiorari be extended to and including March 29, 1974.

CECIL J. BISHOP
Defendant in
Propria Persona

CERTIFICATE OF SERVICE

I certify that service of the foregoing PETITION IN SUPPORT OF MOTION FOR RECONSIDERATION OF DENIAL OF PETITION FOR REHEARING by Appellant was made upon Appellee by mailing copies thereof on this 8th day of March, 1974, in an envelope, airmail, postage prepaid, addressed as follows:

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Clerk
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Michael Rodak, Jr., Clerk
Supreme Court of the United States
Washington, D.C. 02543

NAOMI E. THEURER

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 71-1950

OPINION ON REMAND

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

CECIL J. BISHOP, DEFENDANT-APPELLANT

Appeal from the United States District Court
For the Eastern District of California

BEFORE: ELY and WRIGHT, Circuit Judges,
and POWELL, District Judge*

PER CURIAM:

This case has previously been before this court. *United States* v. *Bishop*, 455 F. 2d 612 (9 Cir. 1972). Certiorari was granted. The decision was reversed and the case remanded. ..... U.S. ..... (1973). The remand directs consideration of two claims of error not reached in the prior disposition. They are that: (1) The court erred in admitting evidence as to the appellant's 1961 income tax return (the charges in the indictment involved returns for the years of 1963, 1964 and 1965); and (2) The court erred in admitting evidence that the taxpayer reported an item of income in his 1964 return that was not received until 1965.

The 1961 return was admitted to show a pattern of

* Honorable Charles L. Powell, Senior United States District Judge for the Eastern District of Washington, sitting by designation.

overstatement of deductions. (Tr. 508-517, 600, 623-626). Internal Revenue Agent Beyers testified (Tr. 601-608) about certain non-allowable deductions in 1961 that were similar to deductions proven improper for the years of the indictment. No prejudicial error appears here.

The 1965 income item was shown to have been reported in the 1964 return only to show knowledge and wilfulness by the defendant and was not offered or admitted as proof of defendant's overstatement of expenses. (Tr. 505-507).

On the Supreme Court mandate and finding no error in the claims reviewed above, the conviction of the appellant is affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1457

CECIL J. BISHOP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence did not establish his guilt and that Section 7206(1) of the Internal Revenue Code of 1954 is constitutionally defective for failure to set forth a sufficiently ascertainable standard of guilt.

After a jury trial in the United States District Court for the Eastern District of California, petitioner was convicted of willfully making and subscribing, under the penalties of perjury, income tax returns for the years 1963, 1964, and 1965 that he did not believe to be true and correct as to every material matter, in violation of Section 7206(1) of the Internal Revenue Code of 1954.He was sentenced to 90 days' imprisonment in

a jail-type institution (to be served over 45 consecutive weekends) and five years' probation. The court of appeals reversed and remanded for a new trial, holding that petitioner was erroneously denied a lesser-included offense instruction under which the jury could have found him guilty only of the misdemeanor of filing false documents, in violation of 26 U.S.C. 7207. *United States* v. *Bishop,* 455 F. 2d 612 (C.A. 9). This Court granted the government's petition for a writ of certiorari, reversed the court of appeals, and remanded the case to that court for consideration of the other issues raised by the appeal. *United States* v. *Bishop,* 412 U.S. 346. The court of appeals then affirmed the conviction in a *per curiam* opinion (Pet. App. 29-30). *United States* v. *Bishop,* 485 F. 2d 248 (C.A. 9).

Petitioner's tax returns for the years 1963, 1964, and 1965 significantly overstated the deductible expenses of a walnut ranch which he owned (Tr. 861-862, 947).[1] At trial petitioner, an attorney, did not dispute the falsity of the returns (Tr. 869-870, 1148). The walnut ranch was managed by petitioner's stepmother (Tr. 72). Petitioner gave her weekly checks, which she deposited to a separate bank account, and she paid the ordinary operating expenses of the ranch from that account (Tr. 73-77). At the end of each year, petitioner's stepmother provided him with a detailed accounting of all deductible ranch expenses that she had paid during the year (Tr. 81-84, 91, 95, 135, 162, 168). Petitioner deducted both these items and the weekly payments to

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[1] "Tr." refers to the transcript of proceedings at trial.

his stepmother as ranch expenses on his income tax returns (Tr. 861-862). In this way, petitioner in effect took two deductions for each item of ranch expense his stepmother paid: he took one deduction for the initial transfer of funds to her and a second deduction for the actual expenditure (Tr. 576).

Moreover, the amount petitioner paid over to his stepmother covered not only ranch expenses but also a substantial number of nondeductible personal items, including his weekend entertainment expenses at the ranch (Tr. 73-74). In addition, petitioner improperly claimed deductions for repayments of principal on a number of loans (Tr. 861-862). The following table summarizes petitioner's underreporting of income:

	1963	*1964*	*1965*
Reported net taxable income	$ 1,494	$ 64	$ 6,772
Add: Improper deductions	19,924	17,022	10,063
Actual net taxable income	$21,418	$17,086	$16,835

As can be seen from this recitation of facts, there was ample evidence to support petitioner's conviction under Section 7206(1). Moreover, there is nothing vague or uncertain about the standard of guilt prescribed by that provision; like the federal perjury statute, 18 U.S.C. 1621, it proscribes the willful making of sworn statements without belief in their truth. Petitioner's contention here is nothing more than reiteration of his defense at trial that he believed his returns were truthful. The jury decided that issue against him, and it warrants no further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

DOJ-1974-05